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# Public interest litigation according to the jurisprudence of the International Court of Justice

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**Abstract:** The present paper is based on the analysis of the jurisprudence of the International Court of Justice (ICJ) in relation to the argument of the public interest litigation. Is this an old or new notion used by the jurisprudence of the ICJ? What relationship does it have with erga omnes rights? Was the role of the ICJ always the same or have we taken new paths in recent years? What is its relationship with international responsibility? These are some of the questions that this work asks and which it tries to analyze with the help of the jurisprudence of the ICJ and especially the path that has followed the last few years in the sector.

**Keywords**: public interest litigation; international public interest; ICJ; international jurisdiction; international public law; international community; international interest; international legal system; international jurisprudence.

## Introduction

The topic of the public interest litigation within the ICJ began through an initial position that was given in the Barcelona Traction case (Chinkin, 1993; Villalpando, 2010; Thin, 2011; Schaffer, 2012; Ngobeni, 2012; Gray, 2015; Costelloe, 2017; Liakopoulos, 2020; Kreuz, 2020)[1]. This is an immediate position which in reality the ICJ responded to the erga omnes obligations in a fragmented and contradictory manner due to some accessory and marginal statements respectively to the definition of the dispute (Coffman, 1996).

The matter of public interest litigation was not addressed in a unified manner by the ICJ itself despite the fact that it attempted to reconstruct a jurisprudence divided into various parts by

1ICJ, Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, 5 February 1970, in ICJ Reports, 1970, p. 3ss., parr. 39ss. Judge Higgins expressed on the sidelines of the consultative opinion on the Wall when he stated that the reference, in the Barcelona Traction judgment, to the erga omnes obligations "(…) was directed to a very specific issue of jurisdictional locus standi" (Separate opinion, ICJ Reports 2004, p. 207 ss., p. 216, par. 37). See also the confirm from the Barcelona Traction case: "on the universal level (...) embody human rights", that "do not confer on states the capacity to protect the victims of infringements of such rights irrespective of their nationality" (sentence, op. cit., p. 47, par. 91). Chinkin in regard on the famous dicta from the Barcelona Traction case: "(…) the Court in Barcelona Traction was not discussing procedural rights, and the actual decision in that case does nothing to promote the notion of protection of third party interests through development of judicial procedures (…) actio popularis as a "third party claim made on behalf of the international community (…)". See also from the: International Law Commission (ILC), Draft Articles on Responsibility of states for Internationally Wrongful Acts, with Commentaries (2001), ILC Yearbook 2001, vol. II, Part Two, and UN Doc. A/56/10, Art. 48.

illustrating the issues involved with this topic, distinguishing it from the main issues that had to do with the main dispute.

Jurisprudence to date has a natural ratione materia competence which reveals the relative promotion of the rules on the protection of global public goods and interests (Voeffray, 2004; Tams, 2005; Thirlway, 2005; Kawano, 2012; Nollkaemper, 2012; Buggenhoudt, 2014; Thin, 2021). This is a position that is based on erga omnes obligations, used to qualify obligations of importance for the entire international community with a wide margin of extension to cases that result from a contained list that dates back to the Barcelona Traction case (Xiao, 2022)[2]. We

2ICJ, Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, 5 February 1970, op. cit., par. 34. according to Higgins: "(…) there is surely a general legal interest, in the broadest sense, in the maintenance of legal obligations which admit of diplomatic protection. These are part of the reciprocal fabric of international law, in which there is understandably a collective interest. Is it really correct, as the Court seems to imply, that obligations erga omnes entitle any state to claim against the alleged wrongdoer? If in the Court's example, State A engages in racial discrimination against a national of State B, is State C entitled to espouse his claim on the grounds that the obligation of non-discrimination is erga omnes? It seems bizarre for the Court to be suggesting this when in 1966 it declined to pronounce on whether racial discrimination was prohibited under general international law (…)". ICJ, Application of the Convention on preventing and suppressing the crime of genocide hereafter Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia), preliminary exceptions, judgment, 11 July 1996, ICJ Reports 1996, par. 31 "the rights and obligations enshrined by the (Genocide) Convention are rights and obligations erga omnes (…) les droits et obligations consacrés par la convention (sur le génocide) sont des droits et obligations erga omnes (…)". Armed activities on the territory of Congo (new appeal: 2002) (Republic Democratic of Congo v. Rwanda), precautionary measures, order, 10 July 2002, ICJ Reports 2002, pp. 219ss, par. 245, par. 64, and jurisdiction and admissibility, judgment, 3 February 2006, ICJ Reports 2006, pp. 6ss, par. 31, par. 64 ("it follows" that the rights and obligations enshrined by the Convention are rights and obligations erga omnes (...)). In the same spirit see also the case: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) of 22 July 2022.

recall the obligation to respect the obligations and the principle of self-determination of peoples where it has also been included among the relevant examples (Sarmiento Lamus, 2013; Carter, Muylgrew, Abels, 2016; Cogan, 2016; Blaise Ngameni, 2017; Van Der Wilt, Paulussen, 2017; Boas, Chifflet, 2017; Nicholson, 2018; Liakopoulos, 2020)[3].

3In the East Timor case (East Timor (Portugal v. Australia), judgment, ICJ Reports 1995, p. 102, par. 199) the ICJ accepted the "irreproachable" erga omnes character of the right of peoples to self-determination, but held that: "(…) the erga omnes character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a state when its judgment would imply an evaluation of the lawfulness of the conduct of another state which is not a party to the case (…) the Court cannot act, even if the right in question is a right erga omnes (…)". Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (ICJ, Request for an Advisory Opinion) Written Statement of the African Union (1 March 2018) paras 69, 217; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (ICJ, Request for an Advisory Opinion), Written Statement submitted by the Government of the Republic of South Africa (1 March 2018) parr. 180. In the 20 July 2012 sentence relating to the controversy over the questions concerning the obligation to prosecute or extradite (Belgium v. Senegal), ICJ has for the first time: "(...) used the term "erga omnes" to designate collective obligations of a nature Convention that have a structure similar to the collective obligations of a customary source, qualifying the obligations assumed by states parties to the UN Convention against torture as erga omnes partes obligations (…) and parr. 68-69: "(…) "[l]'ensemble des États parties ont "un intérêt juridique" à ce que les droits en cause soient protégés (...) Les obligations correspondantes peuvent donc être qualifiées d'"obligations erga omnes partes", en ce sens que, quelle que soit l'affaire, chaque Etat partie a un intérêt à ce qu'elles soient respectées. L l'intèrêt des Etats parties à ce que soient respectèes les obligatios pertinentes ènoncèes dans la convention contre la torture implique que chacu d'entre eux puisse demander qu'un autre etat partie, qui aurait manque auxdites obligations, mette fin à ces manquements. Si un intèrêt particulier ètait requis à cet effet, aucun Etat ne serait, dans bien des cas, en mesure de prèsenter une telle demande. Il s'ensuit que tout Etat partie dans le but de faire constater le manquement allèguè de celui-ci à des obligation erga omnes partes" contra see the dissenting opinions of judges Stotnikov and Xue, parr. 10ss. See also: A. Arangio-Ruiz, Fourth report on state responsibility, UN Doc. A/CN.4/444 e Add.13, 12 and 25 May and 1st and 17 June 1992, par. 92. Military and paramilitary activities in Nicaragua (Nicaragua v. United States), precautionary measures, ordinance, 10 May 1984, ICJ Reports 1984, parr. 196-197. Judge Schwebel, in the Nicaragua case, argued along the same lines. He commented that the Court's earlier decision in the 1966 South West Africa case 'was rapidly and decisively replaced' by

The discussion of erga omnes obligations is always a topic "in fashion" in all the disputes of the ICJ. Recently, we have also seen the related discussion also in the debate on international public goods, i.e. ius cogens where recent jurisprudence has appear in the jurisprudential history of the ICJ (Costelloe, 2017).

**What are the issues resolved in the case of disputes and erga omnes offences?**

We can accept, say and conclude that the jurisprudence of the ICJ has specifically clarified the issues having to do with the consensual jurisdiction of the ICJ and the erga omnes obligations (Vermeer-Kunzli, 2007). It is now a rule not only in theory but also in practice that the formation of rules aimed at guaranteeing the collective interests of states in international law before a super partes and non-national judge are rules set in terms of admissibility of the relevant appeals presented according to the general interest and regardless of the existence of a title of competence relating to the body in question. This is

the Court's dictum in Barcelona Traction to the effect that all states have a legal interest in the protection of obligations erga omnes. Diss. Op. of judge Schwebel, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), (Provisional Measures), ICJ Reports (1984), at 169, 197. Project Gabčikovo-Nagymaros case (Hungary v. Slovakia), even if in substance matters of environmental protection, were treated by ICJ in a plenary meeting. In particular the dissenting opinion of judge Dugard in case: Certain Activities Carried Out by Nicaragua in the Border Area. Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica (Costa Rica v. Nicaragua) of 2 February 2018, par. 35.

an orientation that has lost relevance and is now an abandoned path following the explicit positions of the ICJ where it appears that the consent of the parties in dispute constitutes an essential basis taken in the explicit position of the ICJ resulting that the consent of the parties in dispute lite exercises its contentious jurisdiction and the appeal has as its object the liability deriving from erga omnes torts.

The voluntary nature based on the jurisprudence of the ICJ even during a trial that concerns the violation of relevant rules that protect collective interests of the international community[4] are clarifications that imply other aspects of its jurisdiction under investigation. This is how the relevant statements regarding the applicability of the exception of the indispensable part should be considered where the ICJ:

"(...) cannot express its opinion on a dispute when its decision is likely to directly and substantially influence the legal situation of a third party state that has not accepted its jurisdiction (...)"[5].

4According to the case East Timor (East Timor (Portugal v. Australia), judgment, ICJ Reports 1995, the ICJ affirms that: "(…) the erga omnes character of a norm and the rule of consent to jurisdiction are two different things (…) and in case Armed activities on the territory of Congo (new appeal: 2002) (Republic Democratic of Congo v. Rwanda), precautionary measures, order, 10 July 2002, op. cit., par. 64: "(…) le seul fait que des droits et obligations erga omnes seraient en cause dans un différend ne saurait donner compétence à la Cour pour connaître de ce différend (…)".

5According to the case East Timor (East Timor (Portugal v. Australia), judgment, ICJ Reports 1995, par. 29, the ICJ affirms that: "(…) whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of state conduct when its judgment would imply an evaluation of the lawfulness of the conduct of another state which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right erga omnes (…)".

Taking inspiration from this jurisprudential statement, we remind ourselves that the forms of actio popularis in international law are prior to the affirmation of erga omnes obligations and have already been linked since the First World War as a consequence of treaties dealing with special regimes to the protection of individuals and/or groups of individuals relating to minorities and mandates that contained a jurisdictional clause in favor of the permanent court of international justice. These are norms that have a conventional nature and which anticipate the foundations for the development of collective obligations of general international law. On the other hand, the ICJ itself has tried to affirm the relative validity of the reservations placed on jurisdictional clauses which are contained in treaties which have as their objective the protection of interests which refer to the international community[6]. Yet another parallel path is that of the lack of jurisdiction which respects issues which also have to do with alleged erga omnes wrongs and which fall within the topic of application of the treaty where the arbitration clause is invoked as the basis of the jurisdiction which extends to wrongs not clearly attributable to the content of the treaty itself regardless of its severity (Akhavan, 2015; Gillich, 2016)[7].

6Armed activities on the territory of Congo (new appeal: 2002) (Republic Democratic of Congo v. Rwanda), precautionary measures, order, 10 July 2002, op. cit., par. 67 and 73.

7ICJ, Application of the Convention on preventing and suppressing the crime of

The requests for interpretations in a broad way, including the arbitration clauses that are present in treaties, provide for obligations that do not have a "synnalgmatic character" but which ensure a rigor that has to do with the existence of the relevant requirements that are foreseen for the institution that has the own expertise (Cançado Trindade, 2020)[8].

Failure to respect the invoked title of jurisdiction, the ICJ declares incompetent on the activities on the territory of the Congo[9], as well as the application of the International Convention on the Elimination of any form of racial

genocide hereafter Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia), preliminary exceptions, judgment, 11 July 1996, ICJ Reports 1996, pp. 595ss, par. 104, 147 ("the rights and obligations enshrined by the (Genocide) Convention are rights and obligations erga omnes"), "(…) not amounting to genocide, particularly those protecting human rights in armed conflict (…) even if the alleged breaches are of obligations (…) which may be owed erga omnes (…)". Sentence of 3 February 2015 in the application of the convention for the prevention and repression of the crime of genocide (Croatia v. Serbia, ICJ, Reports, 2015, par. 47-48 and 88: "(…) aucun fondement (…) permettant de connaître d'un différend portant sur la violation supposée des obligations qu'impose le droit international coutumier en matière de génocide (…)".

8According to the opinion of judge Cançado Trindade in oral phase of 17 September 2010, CR 2010/11, pp. 35-36: "(…) in your understanding, does the nature of human rights treaties such as the CERD Convention (regulating relations at intra-state level) have a bearing or incidence on the interpretation and application of a compromissory clause contained therein? (…). And according to the response of Georgia: "(…) the character of human rights treaties-in particular their non-synallagmatic character-provides a reason for the broad interpretation of compromissory clauses, and not for their narrow or restrictive interpretation (...)" (Answers of Georgia to judges' questions, 24 September 2010, p. 5).

9Armed activities on the territory of Congo (new appeal: 2002) (Republic Democratic of Congo v. Rwanda), precautionary measures, order, 10 July 2002, op. cit., parr. 41, 43 and 91. See also the dissenting opinion of judge Al-Khasawneh, I.C.J. Reports, 2006, parr. 73, 77, 78-79.

discrimination[10].

The tendency of the ICJ in the area relevant to the protection of erga omnes obligations was a restrictive interpretation of the rules on consensual jurisdiction. It seems that it followed a rather soft, secondary approach as we have also seen in the case of the convention on genocide and the related preliminary exceptions where in determining the existence of its jurisdiction ratione temporis, it considered that this could also cover situations that occurred before the entry into force of the Genocide Convention between the parties to the dispute

"(...) extending its jurisdiction beyond the temporal limits of the consensus expressed by the states in question. In the following jurisprudence it took a step back towards greater caution of a protective, cautious nature" (Gaja, 2013).

In the case on issues concerning the obligation to prosecute or extradite, the Court examined whether the conduct was followed and taken into consideration even before entry into which the

10Application of the international Convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation), request for the indication of provisional measures, order of 15 October 2008 (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Preliminary Objections), ICJ Reports 2011, p. 70, parr. 122-184). In the same spirit see also by the jurisprudence of the ICJ: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Order of 7 December 2021, para 40, affirming its prima facie jurisdiction; and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, ICJ Reports 2018 (II), p. 419, para 41 affirming its prima facie jurisdiction: In particular the par. 22 of Georiga v. Russian Federation case of 2011, op. cit., par. 114 affirms that: "(…) ne donne pas à penser que la tenue de négociations formelles au titre de la Convention ou le recours aux procédures visées à l'article 22 constituent des conditions préalables auxquelles il doit être satisfait avant toute saisine de la Cour (…)".

complaining state was party to the Convention against Torture[11]. In the case between Croatia and Serbia in the matter of the application of the Genocide Convention the Court:

"(...) excluded that Art. IX of the Convention could operate as (…) une disposition générale sur le règlement des différends", as "[l]a compétence qu'il prévoit est limitée aux différends entre les parties contractantes relatifs à l'interprétation, l'application ou l'exécution des dispositions de fond de la convention sur le génocide (...)".

It is understood that the operation of the arbitration clause retroacts to a previous moment which respects the entry into force of the relevant dispute of other provisions that are part of the relevant Convention[12].

**The interest in acting and protection of collective interests**

One of the major problems relating to the topic that has to do with public interest litigation is the legitimation of states that are not harmed from an individual point of view in court and as a consequence the request or not of the asserted collective interests. It is obvious that the legitimation of this type of actor can have both a negative and positive character. Negative

11Application of the international convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation), request for the indication of provisional measures, order of 15 October 2008 (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Preliminary Objections), op. cit., par. 104.

12Application of the international convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation), request for the indication of provisional measures, order of 15 October 2008 (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Preliminary Objections), op. cit., par. 93.

because the typical structural basis of bilateral relations is justified in a trial before international courts, as well as by the general tendency of ius standi in iudicio and the absence of the notion of erga omnes obligations. On the other hand, a positive position that enhances the fact that the recognition of these obligations dates back to the Barcelona Traction ruling and is conceived by the ICJ itself as an element of denial of the actio popularis with a quite different tendency from what we see in the South-West Africa case of 1966 (Villalpando, 2013; Tams, Tzanakopoulos, 2010; Tzanakopoulos, 2013)[13]. However, in practice there are positions that are not so explicit in the relevant jurisprudence on the matter (Thirlway, 2013)[14].

In the majority of cases the ICJ found itself faced with disputes relating to the alleged violation of erga omnes obligations and the relevant appeal was always presented by the state itself and affected by the relevant tort in dispute in this regard. The assessment of the appellant's relative interest in taking action was faced with dubious situations where the appellant's legitimacy appeared evident in the face of controversies over nuclear tests or the East Timor affair, where the ICJ:

13See also the sentence of Wimbledon case (UK, France, Italy, Japan, Poland intervening v Germany), Series A, August 17, 1923, par. 20 and 22, is affirmed that: "(...) "intérêt pécuniaire lésé" (par. 20) (…) devenu une voie internationale, destinée à rendre plus facile, sous la garantie d'un traité, l'accès de la Baltique, dans l'intérêt de toutes les nations du monde (…)" (par. 22).

14"(…) the wishful thinking of some publicists who have no money to spend, no troops to send, no children likely to die in a military action (…)".

"(...) had not the opportunity to deal specifically with these aspects, having declined its jurisdiction on the basis of other elements (…)" (Becker, 2017)[15].

## (Follows). In favor of the recognition of the ius standi as erga omnes principle

The International Law Commission (ILC) stated that the expression "invocation of responsibility" has to do with the appeal to a judicial body as established by Art. 48 DARSIWA (Liakopoulos, 2020)[16]. It constitutes: "(...) a deliberate departure (...)" according to the ruling of 1966 in the South-West Africa case which concerned closure as a solution to an actio popularis affirmed by the ICJ itself (Mènard, 2010)[17]. So Art. 48

15See the sentence of 20 December 1974 nuclear esperiments, Australia v. France and New Zealand v. France, CIJ Reports, 1974, par. 52. See also: Joint Dissenting Opinion of judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, Nuclear Test cases, Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports, 1974, p. 253, at p. 370, para. 117: "(…) if the materials adduced by Australia were to convince the Court of the existence of a general rule of international law, prohibiting atmospheric nuclear tests, the Court would at the same time have to determine what is the precise character and content of that rule and, in particular, whether it confers a right on every state individually to prosecute a claim to secure respect for the rule. In short, the question of "legal interest" cannot be separated from the substantive legal issue of the existence and scope of the alleged rule of customary international law. Although we recognize that the existence of a so-called actio popularis in international law is a matter of controversy, the observations of this Court in the Barcelona Traction, Light and Power Company, Limited case suffice to show that the question is one that may be considered as capable of rational legal argument and proper subject of litigation before this Court (…)". In the East Timor case (East Timor (Portugal v. Australia), judgment, op. cit., par. 36, it was affirmed that: "(…) it was not required to consider Australia's other objections" and that "it could not rule on Portugal's claims on the merits, whatever the importance of the questions raised by those claims and of the rules of international law which they bring into play (…)".

16See par. 2 of the commentary of arr. 42 of the project. Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), UN Doc. A/56/10, ILC Report 2001).

17Third report on state responsibility, UN Doc. A/CN.4/507, 10 March 2000,

DARSIWA and the legitimation of omnes as an element that shows the responsibility of the author of an offense erga omnes demands the cessation of the violation and the related violation of the victims who are interested, i.e. the injured state and the beneficiaries of the obligation. The same trend is also remembered from Art. 3 of the resolution adopted in 2005 of the "Institut de droit international" on "(…) obligations erga omnes in international law (...)", precisely recognizing the possibility for each state to claim its interests before the ICJ as well as to another "international judicial institution" taking into consideration that there is a jurisdictional link through the appellant state and the relevant author of the violation which is the subject of dispute[18].

Continuing with the ruling on the dispute between Belgium and Senegal relating to the issues concerning the obligation to prosecute or extradite under the Convention against Torture,

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par. 118: "(...) view taken by the International Court of Justice in the 1966 South West Africa cases holding that a state may not bring legal proceedings to protect the rights of non-nationals has to be qualified in the light of the articles on state responsibility for internationally wrong- ful acts (…)". See also Dissenting Opinion of Judge Winiarski who states: "(…) reference has been made in this connection to an institution under the old Roman penal law known as "actio popularis" which, however, seems alien to the modern legal systems of 1919-1920 and to international law. Is it possible that such can have been the common intent of the framers of the Mandate instruments? There is no evidence for it, it has been asserted without any attempt to show that it was so; on the contrary, it would seem that the circumstances in which the Mandate was established exclude such an eventuality". SWA case, 1962, ICJ Rep. p. 452. Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006), UN Doc. A/61/10.

18Resolution of the Annuaire de l'Institut de droit international, vol. 71-II, Session de Cracovie, 2015, 288ss.

where for the first time in 2012 the ICJ declared its admissibility of an appeal in the absence of a special interest by enhancing the collective nature of the obligations brought to justice. Thus, obligations were already foreseen by the Convention itself on the prohibition of torture as elements identified in the erga omnes partes obligations before the ICJ.

This is an immediate solution that also later confirms the case of whaling in the Antarctic on 31 March 2014[19]. Australia was against Japan due to Japan's lack of respect for the International Convention on the Regulation of Whaling of 1946 and because of the continued whale capture and killing permits under the JARPA II program (Tams, 2016).

This is a discourse that was oriented towards the protection of a public interest of the international community, i.e. in relation to the conservation of animal species threatened with extinction (Crawford, 2011; Fitzmaurice, 2013; Tams, 2016). Australia has not put on the table any infringement of a specific interest and the opinions of even individual judges have directly addressed the issues of admissibility of the relevant appeal as a qualification of the obligations in question[20].

19ICJ, New Zealand in the whale hunting in Antarctica case (Australia v. Japan) declared admissible by order of 31 March 2014, ICJ Reports, 2014, par. 226.

20According to judge Bhandari: ("[w]hat injury, if any, has Australia suffered as a result of Japan's alleged breaches of the ICRW through JARPA II? (...)": CR 2013/13, 3 luglio 2013, p. 73): "(…) Australia does not claim to be an injured state because of the fact that some of the JARPA II take is from waters over which Australia claims sovereign rights and jurisdiction (…) every party has the same interest in ensuring compliance by every other party with its obligations under the 1946 Convention.

The relative silence presented as a defense resulted in the absence of specific objections on the part of the defendant, given that he was limited to contesting the very jurisdiction of the ICJ. The reasons that "pushed" Japan to adopt a certain behavior were also a type of procedural strategy given that the ICJ proceeded not with the consolidation of the general trend of greater openness in favor of the jus standi of omnes but with the relative previous sentences which concerned the obligation to prosecute or extradite (Tams, 2016). Australia was based on an action in defense of a collective interest of the states parties to the Convention and also because some of Japan's related activities had been used in areas where there had always been problems, clearly speaking of claims of sovereignty[21].

In the South-West Africa case relating to the dispute between Liberia and Ethiopia, the appeal did not accompany the claims that are formulated and based on the general interest with the affirmation of direct and individual interests as happens in the case of the appeals which had dealing with Australia and New Zealand in the nuclear testing case[22], Portugal in the East Timor

Australia is seeking to uphold its collective interest, an interest it shares with all other parties (…)". (Burmester, CR 2013/18, 9 July 2013, par. 19).

21"(…) any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation (…)".

22See Memorial on jurisdiction and admissibility submitted by the government of Australia, 23 novembre 1973, p. 331, par. 430 ss.

case[23] and Belgium in the case of issues having to do with the obligation to prosecute or extradite.

We can speak of a "new type" of jurisprudence which followed the ICJ and moved away from an arbitration clause provided for in the treaties promoted by the United Nations, especially in matters of the protection of human rights and in the case of issues concerning the obligation to prosecute or extradite according to Art. 22 of the Convention against Torture. That is, a clause that is broadly formulated and taken into consideration according to the purpose of the treaty inserted, allowing the appeal and in the absence of a direct prejudice to the appellant in his own interest in respecting the integrative harmonization of the conventional regime in dispute. Certainly a type of integrity exclusive to declarations of acceptance of jurisdiction of a mandatory nature is based on the former Art. 36, par. 2 of the statute[24], i.e. as an option that in the past excludes the intentions

23East Timor (East Timor (Portugal v. Australia), judgment, ICJ Reports 1995, op. cit., par. 5.45: "(…) la puissance administrante subit individuellement et directement un préjudice chaque fois que ses compétences sont méconnues par un État tiers et chaque fois qu'un État tiers fait obstacle à l'exercice de ses compétences (...)".

24Application of Ethiopia, ICJ, Pleadings, Oral Arguments, Documents, SWA cases (Ethiopia v. South Africa; Liberia v. South Africa), Volume I, 1966, paras. 4-8, 6-14. Also see Written Memorial of Ethiopia, submitted on 15 April 1961, SWA cases, 1966, Volume I, p. 32., at p. 91. Observations submitted by Applicants, p. 455. (Observations of Governments of Liberia and Ethiopia, 1 March 1962, p. 456 of Observations: "(…) in instituting these proceedings, Applicants have moved to protect not only their own legal interests but the legal interests of the United Nations (which itself, may not be a party to contentious proceedings), as well as the legal interests of every other Member State similarly situated the Applicants further noted: "(…) while it (the dispute) affects the interests of Applicants in assuring compliance with international undertakings, in furthering the principles of the Charter, and in

expressed by the states at the time of joining a system of the optional clause (Van Dijk, 1980; Loomer, 2016).

The interpretative path of the ICJ was a difficult but also decisive job given that we did not see tendencies to return to the past or to decisions taken in the past (Tams, 2016)[25]. The

promoting the welfare and human rights of the inhabitants of the Mandated Territory, it is not a matter of sole or exclusive interest to Applicants and Respondent. The dispute is of concern and interest to all states, at least those which are Members of the United Nations (…)". At p. 456(1): See also a more extended expounding of the Applicants' proposition in the Observations. At page 456 (1) of their Observations, the Applicants further stated: "(…) in disputing and negotiating with Respondent in the United Nations during the past several years, Applicants, therefore, have been upholding their own legal interests in the proper exercise of the Mandate; but they have been doing more than that. They have also been upholding the collective legal interest of the Members of the United Nations and the interests of the Organization itself (…) firstly, that the word "dispute" in a jurisdiction clause such as Article 7 connotes a conflict or disagreement concerning matters in which the Applicant has a legal right or interest. The second is that the Applicants as individual League Members were not intended to have a legal right or interest in matters such as those now before the Court unless their material interests were affected either directly or through their nationals; and inasmuch as their material interests are not affected, their legal rights or interests are not involved, and therefore it cannot be said that there is a dispute in terms of Article 7. Finally, that even if it can be said that the Applicants have a legal right or legal interest in the matters presently before the Court, we say it was not intended that such right or interest could, in the absence of anything affecting the material interests of the Applicants or their nationals, give rise to a dispute envisaged in Article 7 for the adjudication by the Court (…) the language used is broad, clear and precise: "(…) It refers to any dispute whatever relating not to any one particular provision or provisions, but to "the provisions" of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory toward the inhabitants of the Territory or toward the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself. For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members (…)".

25"(…) Belgium v. Senegal and Whaling, taken together could perhaps reflect a new willingness on the part of the Court to handle disputes transcending reciprocal inter-state relations (…)". Separate Opinion of judge Skotnikov, Belgium v. Senegal, p. 484, para. 17. Numerous decisions of the European Court and the Commission of Human Rights. In particular: The Commission in the Austria v. Italy of 11 January

procedural legitimacy of the omnes was admitted expressly, implicitly, precisely and only in relation to conventional obligations that have to do with erga omnes partes obligations and there was a lack of relative recognition by the jurisprudence of the collective obligations that have their source in general international law as was obvious and with erga omnes tout court obligations (Klein, Stephens, 2014; Caracciolo, Pedrazzi,

1961: "(…) to establish a common public order of the free democracies of Europe" and that obligations undertaken by the Parties in the Convention "are essentially of an objective character being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves (...)". The Commission in the case of Chrysostomos v. Turkey of 4 March, 1991, noted: "(…) the High Contracting Parties in concluding the Convention intended to achieve greater unity by a common understanding and observance of human rights and to take steps for the collective enforcement of the rights and freedoms defined in Section I" (See para. 20 of the Report). The Commission also distinguished between the declaration of acceptance of the ICJ's jurisdiction under Article 36(3) and the basis of inter-state applications under Article 24 of the European Convention. Whereas the former operates on the principle of reciprocity the latter procedure is brought into effect by virtue of ratification of the European Convention (see para. 22 of the Chrysostomos Report). In the Ireland v. United Kingdom of 18 January 1978, par. 239, the Court noted: "(…) unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting states. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement" (…) by virtue of Article 24, the Convention allows contracting states to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of the their own nationals (…)". See also in argument: ICJ, Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Merits, Judgment, ICJ Reports 2014, p. 226, para. 69; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 62; United States-Import Prohibition of Certain Shrimp and Shrimp Products, 12 October 1998, WT/DS58/AB/R, para. 122; Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, ITLOS Reports 2011, p. 10, para. 180. Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, Chile/European Community, 20 December 2000, List of Cases No. 7. Advisory opinion on the Responsibilities and Obligation of States Sponsoring Persons and Entities with Respect to Activities in the Area, List of cases: No. 17, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, p. 10.

Vassalli De Dachenhausen, 2016; Venzke, 2017; Liakopoulos, 2020; Iovane, Rossi, 2021)[26]. The case on the obligation to prosecute or extradite the affirmation of ius standi of the states parties to the Convention against torture was justified by the reference to the dictum on erga omnes obligations as the main

26Only United Kingdom deposited an act of preliminary exceptions on 15 June 2015, thus giving impetus to the related sub-proceeding. In the case of India and Pakistan, on the other hand, the defendants were challenged about jurisdiction and admissibility, and ICJ decided by ordinances respectively on 16 June 2014 (ICR Reports, 2014, par. 464) and 10 July 2014 (ICJ Reports, 2014, paragraph 471), in accordance with the provisions of art. 79, par. 2 of the Regulation to resolve the questions of jurisdiction and admissibility first. Specifically, the lack of necessary parties was invoked from India as a reason for lack of jurisdiction (see the counter-memorial of 16 September 2015, par. 27ss) and from Pakistan and the United Kingdom, as a reason for inadmissibility of the applications of the Marshall Islands (respectively the counter-memorial of 1st December 2015, par. 8.73 and the preliminary objections of the United Kingdom, par. 83ss). Counter-memorial Pakistan, par. 8.78. According to Pakistan: "A finding of the non proliferation treaty parties, legal obligations under art. VI of the (...) and/or customary international law obligations as alleged by the Republic of Marshall Islands in its application is a precondition for determining the Republic of Marshall Islands claims against Pakistan (...)". In the same spirit we have just see in past the case: Legal consequences for states of the continued presence of South-Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), advisory opinion ICJ Reports 1971, op. 25, par. 22-24. "(…) for these reasons the Court, bearing in mind that the rights of the Applicants must be determined by reference to the character of the system said to give rise to them, considers that the "necessity" argument falls to the ground for lack of verisimilitude in the context of the economy and philosophy of that system. Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an "actio popularis", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (c), of its Statute (…)". The ius standi in iudicio of omnes: "(…) is yet to be developed in international law" according to the judge Xue, I.C.J. Reports, 2016, p. 441, pp. 443-444, par. 8; 733, 735-736, par. 8; p. 1029, 1031-1032, par. 8. see the dissenting opinion of judge Bhandari in case of Pakistan, par. 25, which is affirmed that: "(…) the absence of any prima facie evidence of harm, realized or potential (...) is of such a character as radically to change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation (...)". According to the approach accepted in the draft of the International Law Commission:

content in the judgment in the Barcelona Traction case taking into account that the ICJ has equated erga omnes partes obligations and erga omnes obligations at the procedural level as a product element of a legitimation to act before a contentious proceeding (Follesdal, 2020).

**Are there any open questions?**

From what we understand so far is that not all issues relating to public interest litigation have been resolved. For example, the claims of omnes, as well as the relationship between the individual procedural legitimacy of the injured state and that of other states are topics still to be discussed. In particular in the sector of erga omnes the question of procedural protection is a basis of wide openings in relation to the further development prospects that come from the relevant investigation of the jurisprudence of the ICJ and the related aspects that are relevant with the also a secondary question. Therefore the jurisprudence of the ICJ has not taken a position on all the issues open up to now.

For example, the ICJ did not take a concrete position regarding

"(...) these obligations would be characterized by a different and more favorable invocation regime compared to that applicable to erga omnes or erga omnes partes obligations, since, in the event of their violation, all bound states would qualify as injured states and could therefore fully enforce all the consequences of the offence (…)".

Art. 48 DARSIWA. Perhaps this is a lack due to the relative desire not to take a position on the correspondence to general international law of the indicated norm which was born according to the intentions of the ILC itself and as an exercise in a progressive development of the international law (Liakopoulos, 2020)[27]. The ICJ followed a path that is not easily explained due to the unbridgeable distance through the theoretical position that dates back to the work of the ILC where it considers the omnes according to Art. 48 as non-injured states and thus excluding the ownership of the same rights corresponding to the violated obligations[28].

Furthermore, we can say that the admissibility of the appeals followed by the ICJ are traditionally based on legal action which presupposes the ownership of the rights of the person seeking the relevant protection[29]. Also in this case a relative silence prevents us from arriving at significant elements of a fundamental level due to respect for the works of the ILC which they have taken into consideration by accepting various solutions that raise doubts, perplexities and uncertainties.

27See par. 12 of the commentary of art. 48, in ILC Report 2001 and article 49 of the work of ILC of 2011: "(…) in the interest of the injured state or international organization or of the beneficiaries of the obligation breached (…)". Report on the work of its sixty-third session (26 April to 3 June and 4 July to 12 August 2011), UN Doc. A/66/10, p. 52 ss., p. 145 ss).

28Report on the work of its sixty-third session (26 April to 3 June and 4 July to 12 August 2011), UN Doc. A/66/10, p. 52 ss., p. 145 ss).

29ICJ in its Opinion on Reparation of Damage for the United Nations of 11 April 1949, ICJ Reports, 1949, par. 181-182: "(…) only the party to whom an international obligation is due can bring a claim in respect of its breach (...)".

First of all, the claims have as their content some omnis of a high level. The ICJ initiated the relevant actions by non-injured states and with the aim of protecting public interests, limiting themselves to an assessment of the offense and requesting its cessation. If this were the case, the question remains open regarding the conditions, including limiting ones, of the omnes who can request restitutio in integrum or compensation for damage (Besson, 2018)[30]. This is an orientation that we have also seen on the Court of the Law of the Sea when in the consultative opinion of 2011 on the question of the responsibilities and obligations of states in relation to the exploitation and exploration activities carried out in the seabed area by companies and people controlled by them called Art. 48 DARSIWA as a type of opposition to the erga omnes nature of

30ICJ, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, pp. 422ss, para 101, See also the sentence of 20 July 2012, in ICJ Reports, 2012, par. 69. Certain Activities Carried Out by Nicaragua in the Border Area. Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rican (Costa Rican v. Nicaragua) of 2 February 2018. According to dissenting opinion of judge Dugard, in par. 25: "(…) it is common knowledge that third states hardly ever, if ever, assert their rights arising from the violation of obligations erga omnes. In these circumstances it is the state most immediately affected that is most likely to assert these rights on behalf of both itself and the global community. Costa Rica should therefore have been allowed to recover compensation in full for this harm. In making this claim Costa Rica asserted an interest owed both to itself and to the international community as a whole (…)". And according to the dissenting opinion of judge Bhandari, in par. 16: "(…) preserving and protecting the natural environment [is] one of the supreme obligations under international law in the twenty-first century (…) I am of the view that (...) the law of international responsibility ought to be developed to include awards of punitive or exemplary damages in cases where it is proven that a state has caused serious harm to the environment. The importance which humanity attaches, or ought to attach, to the well-being of the natural environment justifies, in my view, a progressive development in this direction (…)".

the relevant protection obligations in the marine environment by recognizing the legitimation of the omnes and demanding compensation for damages for violations of these obligations (Freestone, 2011; Anton, Makgill, Payme, 2011; Nollkaemper, 2013; Andenas, Weatherall, 2013; Voigt, 2019; Mccaffrey, 2019)[31].

As regards the individual procedural legitimation of the injured or not states in the event of violation of collective obligations, a series of related issues can be noted such as, for example, the importance to be attributed to the relative waiver of the injured state, thus asserting liability (Lefeber, 1996; Rosenne, 1997; Pauwelyn, 2003; Tams, 2010; Gaja, 2013; Liakopoulos, 2022)[32], as well as the possibility of considering that this state is

31ITLOS, Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, ITLOS Reports 2011, p. 10, para. 180, noted that: "(…) each state party may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to preservation of the environment of the high seas and in the area (…)".

32According to Gaja: "(…) the injured state cannot dispose of the general interest in compliance with the obligation (…) a valid waiver by the individually injured state would also extinguish all claims that "other interested states" have (…)". J Pauwelyn affirms that actio popularis: "(...) may be brought even under bilateralizable treaties if the treaty authorizes such action. It is when the treaty is silent on the existence of such a right that the need arises to establish whether it is designed to protect collective interests. Rosenne affirms that: "(…) is amongst the scholars who denies the view that actio popularis are the consequence of the existence of erga omnes obligations (…)". Lefeber noted: "(…) The Court did not intend the recognition of erga omnes obligations to be a general recognition of an actio popularis in international law. According to the Court, the existence of an actio popularis depends on the content of the obligation, or better, on the content of the corresponding right of protection. That is, even in the case of an erga omnes obligation, the content of the obligation may be such as to render the right to bring a claim before the Court conditional on demonstration by the applicant state of an individual substantive interest, such as the bond of nationality in the case of a denial of justice (…)".

indispensable for not being present at the proceedings (Thirlway, 2005). The case relating to issues concerning the obligation to prosecute or extradite was the basis for some discussion points in this regard. The conclusions reached seem questionable as a result not in line with the relevant indications that are provided by the ILC. In this case, in particular, Belgium contested the violation by Senegal and above all the rule of aut dedere aut iudicare which was provided for by the same Art. 7 of the Convention against torture. Thus another special interest is claimed for the injured state given that the state requests the extradition justified due to the Belgian nationality of one of the victims and was disregarded due to the subordination which based its ius standi on the participation of the same convention (Cançado Trindade, 2020)[33]. In particular, the ICJ:

"(...) reversed the order of these arguments and limited itself to verifying Belgium's legitimacy to act on the basis of the second, while, once the question was resolved positively, it considered it superfluous to verify the existence of a more specific interest capable of identifying it as an injured state" (Hernàndez, 2014).

It has shown that the procedural position of the injured state and that of states "other than the injured state" are totally comparable. Only in this sense can we understand the Court's statement according to which the verification of Belgium's

33See the dissenting opinion of Judge Cançado Trindade, I.C.J. Reports, 2012, p. 487 ss., p. 527, par. 104 ss. See also: Mémoire du Royaume de Belgique, Livre I, 1° July 2010, parr. 5.15-5.16: "(…) la Belgique n'est pas simplement un "État autre qu'un État lésé" au sens de l'article 48 des Articles sur la responsabilité-même si cette qualification suffisait pour invoquer la responsabilité du Sénégal. L'État belge est "atteint par la violation d'une manière qui le distingue des autres États auxquels l'obligation est due (…)".

special legitimacy would have been superfluous in the case (Simma, 2014).

We can speak of a rather difficult conclusion given that the idea on the one hand from the works of the ILC is a type of priority in front of the position of the injured state and in relation to the cases of invocation of the relative responsibility of the states which invokes a type of responsibility for wrongs erga omnes. Furthermore, the ILC underlined:

"(...) some form of involvement of the injured state in the judicial initiative taken by a state not directly affected, in the hypothesis in which the claim advanced by that state also includes the request for compensation".

In this situation, according to the Commission,

"(…) a state invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party (…)" (Mènard, 2010; Liakopoulos, 2020)[34].

## Concluding remarks

As we have understood so far, there exists in the jurisprudential field a path of non-adaptation of the prosexual rules, as applicable to making the proceedings contentious before the ICJ in a functional way and in light of the needs of protection of the collective interests of the states. These are trends that in practice the use of experts is the result of an intervention provoked by third states in the trial before the ICJ.

34See par. 12 of the commentary art. 48 of the final project in ILC Report 2001, op. cit.

Of course, in every legal system, the effective level of a judicial system constitutes the main indicator that has to do with the integration of the social community concerned, i.e. public interest litigation (Mosler, 1988; Pomerance, 2014). We can say that the system of the ICJ constitutes a certain doubtfulness, an anomaly that is noted at an international level given that in front of the affirmation of values shared by the entire international community, the rigid protective maintenance of bilateralism as the definition of a contentious competence of the ICJ is a of the conditions of its own functioning which prevents the ICJ from providing answers to the requests for a more incisive role, in our opinion detailed, precise, careful and definitive to the extent that it can obviously in the face of the values that it is called upon to emphasize and place at a high and important level for the entire global community. The ICJ trial has an accusatory nature and is based on party management. On the one hand, the ICJ remains within the limits of the conclusions expressed by the states in dispute and is based on a judgment on concrete facts deduced during the course of the proceedings. Third parties as part of a dispute are required to establish their own fairly limited institutive judgment, despite the fact that the continuous trend towards the multilateralisation of international disputes is a path that is still evolving and continually growing.

The resistance of the states that respect the formal changes in the

face of statutory rules strengthens the judicial protection of erga omnes obligations and the availability of a maximum global jurisdiction is necessarily required that exploits the spaces left for the evolutionary interpretation of the existing rules and valorising the potential of the procedural institutions allowing a large autonomous margin and a position that also includes third parties as suitable to limit the traditional path of an "inter partes litigation".

The ICJ has always had the power according to Art. 50 of the Statute which has not been used often or in the past (Peat, 2014; Tams, Devaney, 2019)[35] leaving independent experts with the task of continuous investigations or expert opinions regarding the relevant cases[36]. The court-appointed experts are part of a management for the exclusive control of the relevant evidence of factual elements to each dispute. A path that is fundamental and relevant for situations where the ascertainment of the facts is very difficult and the interests are great and above all political and then economic as also happens in the discussion of the responsibility of a state for violation of obligations before the international community. The technical-scientific nature of the

35See also the position of the president of the ICJ in the commission of the General Assembly in 26 October 2018. Le recours à des experts désignés par la Cour en vertu de l'article 50 du Statut, www.icj-cij.org/files/press-releases/0/000-20181026-PRE-01-00-BI.pdf.

36ICJ, Certain Activities Carried Out by Nicaragua in the Border Area. Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica (Costa Rica v. Nicaragua) of 2 February 2018, op. cit.

disputes is inherent to environmental offenses and excludes the willingness expressed by the ICJ itself to apply Art. 50 of the statute as a response to the related criticisms which were aimed at the choice to exclusively entrust the experts appointed by the relevant parties on the occasion of dealing with environmental disputes which we have seen in the case of whaling in the Antarctic (Peat, 2014; Tamada, 2016) and/or in the case of factories for the production of wood pulp on the Uruguay River (Cote, 2011; Cançado Trindade, 2020)[37].

There is a relative flexibility that respects the intervention in the process. Intervention by a third state is permitted when it has an interest of a legal nature which is jeopardized by the future ruling-intervention, i.e. of an optional nature and governed by art. 62 or which is part of a multilateral convention as an interpretation of a legal intervention provided for by the same art. 63. The jurisprudence has allowed us to make a distinction within the optional intervention and an identification of the forms of participations attributable to art. 62. Non-party intervention does not deal with the intervener as a consequence of becoming a party to the dispute. On the other hand, the consent of a third state has the aim of introducing some new

37See the joint dissenting opinion of judges Al-Khasawneh and Simma, in sentence of 20 April 2010 in case: Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2006-2010, I.C.J. Reports, 2010, p. 108-110, parr. 4-10. Separate opinion of judge Cançado Trindade, op. cit., par. 135ss, pp. 190-191 and 149-151; Declaration of judge Yusuf, op. cit., p. 216ss. Separate opinion of the ad hoc judge Vinuesa, op. cit., p. 266 ss, p. 284, par. 70ss.

questions as a novelty of one or both of the original parties and in the presence of a "jurisdictional link" with the latter.

According to Art. 63 of the statute, the related disputes that have to do with erga omnes offenses are recognized by the ICJ itself which comes to call and interpret a convention. Within the scope of application there are also erga omnes obligations even when the contracting state may request to intervene. This form of participation of third parties has the aim of realizing an objective interest of the parties in a multilateral convention, uniform with the obligations deriving from it. This is an interest that is considered strengthened and in the case in which the obligations in question have a solid and certainly collective basis. This form of intervention is a potential one where public interest litigation is confirmed in the decision of the ICJ which accepts New Zealand's request for participation in the Antarctic whale case[38]. This opportunity is not a limiting intervention for the issues as the subject of a future decision but as support for a position of the appellant such as New Zealand has considered bringing before the ICJ in the case of Japan.

The ICJ did not address the issue of relevant violations of erga omnes obligations where non-aggrieved states individually may have a sufficient interest in permitting participation in the proceedings. The actual or non-actual behaviors of the

38ICJ, Order of 6 February 2013, in I.C.J. Reports, 2013, p. 4ss.

participating states are compliant positions of the type of judicial actions of an altruistic nature which concern main proceedings and ask for interventions of "general interest". The legitimacy to take legal action of states which are not harmed and above all with regard to obligations towards the international community have some doubts which are expressed in the notion of interest of a legal nature as referred to in art. 62 and are above all outdated (Zimmermann, Tams, Oellers Frahm, Tomuschat, 2019).

This type of form of intervention has as its object the proposition of an interpretative question that has to do with the conduct of the third state on a question of an interpretative, preliminary nature. Of course, the binding effect of judicial interpretation has its own reflection for the intervening state of a binding nature and is based on art. 63, par. 2 as a general principle for the participation of the third party in the relevant cross-examination, implying the binding nature of the decision on the source issue. The interpretative question binds the parties with the relevant decision (equally binding) (Liakopoulos, 2020).

Thus some important scenarios occur: a) intervention requested for the application of a rule as a necessary part that is part of a dispute that the ICJ has examined the relevant arguments carried out believing that it can exclude any right of the third state in the

area that was the subject of the main proceedings. Decision based not only on evaluations of the arguments of the third state but also on constraints in relations with the main parties in dispute; b) intervention that influences the material content of the decision based on a solution that deals with preliminary questions where the questions bind the main parties and also the third state; c) intervention which aims to support the reasons of one of the parties to resolve the main dispute without interfering in the relations between the third state and the main parties. This type of intervention heals the relative consequences of the absence in the judgment of the third state as a necessary rule. The state that intervenes in this way limits itself to an application of the necessary part and is oriented towards a future implicit sentence and expressing its desire for relative participation in the discussion on the matter. The admissibility of the intervention thus balances the interest of the third state in protecting not only the "intèrêt juridique" but also the public interest litigation as an interest now in opposition of the parties thus suffering interference in the judgment that they set on the table of a bilateral relation (Liakopoulos, 2020).

Thus the establishment of erga omnes law in international jurisprudence has an effect of an inorganic nature in the context of the international community and as an intense "polarizing" force of the effectiveness of the sentence of a construction in a

relative legal system. This effective element has as a consequence a reduction of the space for self-interpretation of international norms which have always enjoyed a reductive phenomenon for the detection of general norms and principles, where interpretation is applied only in concrete legal relationships. These rules are not sufficient for the relevant legal interests of the third state but are affected by the sentence and are necessary to resolve the dispute involving an extreme degree of a real object of the judgment.

In the event that the dispute is based on an argument of international responsibility, the legal situations of the third state are directly contemplated by the conclusions of the parties given that the same legal situations contemplate the relative conclusions linked to a relationship of dependence (condition prealable) where the right inferred and the legal situations of the third state are sufficient for the application of the necessary party rule. The criterion thus applied is based on a typical consideration of the relationship existing through the legal situation that arises in court as well as the legal situation of the third state which thus involves a degree of discretion that derives from the fact that such decisions constitute an evaluation of the so-called judicial property (Liakopoulos, 2020).

The intervention of the third party as well as a system of access to justice where the individual requests judicial help before the

ICJ guarantees the independence and impartiality of the judge. This is a rigorous and restrictive definition based on the concept of rule of law, of interpretation and application of the law independently as a typicality of a legal tradition of contemporary systems. Access to justice as a technical topic, characterized by non-democratic experiences where the term justice is understood as a natural judge examining the relevant tools to achieve and resolve political objectives as almost always happens in the context of litigation in the ICJ.

Even in our times, the right to promote actions before international mechanisms that resolve disputes is part of a situation of quasi-monopoly that recognizes the human person as the holder of rights on an international system that remains broad, open to a current interstate structure of rights that continues to hinder the individual's ability to exercise certain rights directly before national or international bodies. Access to justice constitutes a real right, aware of the inevitable limitations that this right suffers in the current interstate structure of international law, thus avoiding the exercise that could be transformed into an element of destabilization of an international legal order.

Within this context the control of legitimacy in connection with the conditions that are directly and in some way individually involved have a cumulative character and directly affect each

individual given that the measures produce effects on the legal situation in a complete and self-sufficient way and leave no discretionary power to the authorities in their application.

In finis we can say that the law of the ICJ began and still continues to be alive and always evolving, as well as being inspired by an idea:

"(...) whereby the rule of law is not so much that based on rules and on the proclamation of rights, but on mechanisms to enforce rules and rights (ubi ius ubi re medium). It would not be far-fetched to include the right to effective judicial protection among the dogmas of community law to be placed alongside principles such as direct effect and primautè, to which the unstoppable development of this system (...) it has offered one of the bases for the affirmation of jurisprudential lines such as that relating to the responsibility of Member States for violations of international law or that concerning a droit de regard of the Union with respect to internal procedural rules (…). The right to effective judicial protection underlies the extensive obligations of motivation to which they are subjected and is intimately linked to the guarantee of the rights of defense in proceedings, even of an administrative nature, which may result in negative consequences for individuals (...)" (Liakopoulos, 2020).

The observer of this legal order of a universal nature has the objective of reinforcing with some world the extreme variety of various local legal systems. Thus a certain differentiation is recorded as something that establishes the new legal order towards a universalism of a global legal system which is concentrated on a vertical and horizontal way between international rights because we still do not know the final universal legal grammar of those legal orders that they are still experienced in other historical eras where the universal vocation and tolerance coexisted with the iura particularia and the

imperial orders which include and govern the formula of indirect rule. The public interest litigation is an important point, an extraordinary legal capacity that coexists, overlaps, composes, serves, highlights the awareness of a plasma of harmonization tools of the international law where through the jurisprudence of the ICJ serves to magnify the continuous successes of a highly appreciated scientific koinè with pre-established and established links between different internationally inspired legal cultures as challenges for the coming years.

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